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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1331

CLAYTON P. KEHOE TOWING COMPANY, INC., a corporation and MARTIN J. KEHOE TOWING COMPANY, INC., a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA and TANKER HYGRADE NO. 18, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition of third-party defendants, Clayton P. Kehoe Towing Company, Inc. and Martin J. Kehoe Towing Company, Inc., by their attorney, Robert P. Whelan, for writ of certiorari to the Supreme Court of the United States, respectfully shows:

1. (a) The unofficial report of the opinion delivered in the United States Court of Claims below is 526 F.2d 805 (decided December 17, 1975).

1. (b)(i) The order sought to be reviewed was entered in the United States Court of Claims on December 17, 1975.

1. (b)(ii) There was no order respecting a rehearing.

1. (b)(iii) Jurisdiction herein to review the order in question is conferred by 28 U.S.C. 1255(1).

1. (c) The questions presented for review on the instant petition are:

1. Whether the United States can implead a third-party defendant in the Court of Claims for a contingent liability in tort.

2. Whether such a third-party defendant, if it can be so impleaded, can be deprived of its constitutional right to trial by jury on such a tort claim.

3. Whether the Federal Water Quality Improvement Act contemplated a claim such as that of plaintiff herein against the United States in the Court of Claims.

1. (d) The statutes and regulations involved are Chapter 91 of Title 28, U.S.C. concerning the jurisdiction of the Court of Claims, Rule 41, of said Court of Claims rules thereunder, the Seventh Amendment to the Constitution of the United States and the Federal Water Quality Improvement Act of 1970, Title 33 U.S.C.

1. (e) Plaintiff is the owner of an oil barge which, when being pushed-towed on a canal leading into Lake Champlain, New York, grounded and was caused to spill oil. At the cost of $152,500.00 it removed the oil and filed a claim in the Court of Claims against the United States for reimbursement thereof under said Water Quality Improvement Act.

The government, alleging its ownership of the tow, impleaded petitioners herein, who, after answer, moved to

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dismiss the impleading petition. The government then moved for summary judgment dismissing plaintiff's petition and also moved to defer action on petitioners' said motion to dismiss which, over objection, was granted, after which petitioners cross-moved for summary judgment dismissing plaintiff's petition.

The Court of Claims granted the government's motion for summary judgment because in the case of *United States* v. *Ira S. Bushey & Sons, Inc.*, 363 F.Supp. 110, affirmed 487 F. 2d 1393 (2nd Cir. 1973), cert. den., 417 U.S. 976 (1974), the Court of Claims held, there was a finding by the District Court which created a collateral estoppel against plaintiff's claim herein. On the basis of dismissal of plaintiff's petition the Court of Claims granted summary judgment to petitioners herein dismissing plaintiff's petition. Also, on the basis of dismissal of plaintiff's petition the Court of Claims dismissed the government's impleading petition.

1. (g) Jurisdiction of the Court of Claims is based on 33 U.S.C. Sec. 1161(i)(l).

1. (h) Petitioners are uncertain whether they must petition for certiorari herein. Supreme Court Rules 23 & 24, unlike Appellate Rule 4(a) do not allow for "Cross-petitions" for certiorari, but only opposing briefs. While there is precedent in lower courts that an appellee may argue a point other than that on which the lower court relied to sustain judgment below without having cross-appealed, even though it is satisfied with the net effect of the judgment below, *General Instrument Corp.* v. *United States*, 462 F. 2d 1156, 1160, still, in *Morley Construction Co.* v. *Maryland Cas. Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 81 L. Ed. 593, 597, it is stated that an appellee without a cross-appeal may not " 'attack the decree with a view either to enlarging his own rights there-

under or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below' . . . The rule is inveterate and certain." Cf. also *Smith* v. *Boise City, Idaho,* 9th Cir., 104 F. 2d 933.

Petitioners herein contend that the Court of Claims has deviated from the usual course of proceedings in judicial proceedings wherein the federal courts, being courts of limited statutory jurisdiction, when there is no dispute as to the facts, make jurisdictional determinations unequivocally, at any stage of the proceedings.

Here if the Court of Claims is reversed, presumably the impleading petition will be reinstated.

It has always been the contention of petitioners herein that the Court of Claims is a statutory court, 28 U.S.C.A. Sec. 171 of limited jurisdiction, the purpose of which is to award damages against the government in non-tort actions. 28 U.S.C.A. Sec. 1491; *Glidden Company* v. *Zdanck,* 370 U.S. 530, 556, 82 S. Ct. 1459, 1476, 8 L. Ed. 2d 671, 691; *Clark* v. *United States,* 461 F. 2d 781, cert. den. 409 U.S. 1028.

While the Federal Water Quality Improvement Act, Title 33 U.S.C. creates such jurisdiction against the United States, the government, availing itself of Rule 41(e) and (f) of the Court of Claims, and attempting to use it like Rule 14 of the Federal Rules of Civil Procedure, would make the government a claimant in tort.

The net result, among other things, would be to deprive petitioners of their right to a jury trial under the Seventh Amendment to the Constitution of the United States.

Said Water Quality Improvement Act does provide for third-party liability to the United States for the costs

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of removal of oil "in any court of competent jurisdiction", 33 U.S.C. Sec. 1161(g), but the Court of Claims would not be such a court.

The Court of Claims itself has decided that its rules may not go beyond its Congressional jurisdiction, *Rolls-Royce Limited, Derby, England* v. *United States,* 364 F. 2d 415.

Petitioners herein further contend that whether or not the cited case of *United States* v. *Ira S. Bushey & Sons, Inc., supra,* constitutes collateral estoppel as to plaintiff in its claim against the government, it is conclusive as to the non-liability of petitioners herein. As to them there was a specific finding that somebody else, i.e., the *Blue Line 107,* push towed by the tug *Seneca,* caused the oil spill. There was no alternative to that specific finding, nor was there anything equivocal about it.

On the other hand, regarding plaintiff vis-a-vis the government, the Court of Claims admitted that such a finding was cumulative. By its definition, in law, that which is cumulative is that which "tends" to prove a point. Webster's New Collegiate Dictionary.

For the equitable purposes of the injunction in *United States* v. *Ira S. Bushey & Sons, Inc., supra,* it could be that control by Ira S. Bushey & Sons, Inc. over plaintiff herein "tended" to prove the right to the relief sought against Bushey. Whether it "tended" to prove that, by reason of such control, plaintiff herein is ousted of any right under the Water Quality Improvement Act is questionable, at least on a motion for summary judgment.

Plaintiff's position is akin to the concept of residence for tax, voting and service of process. The one may or may not embrace the other.

It is submitted that the statute is too new to have been so tested on a motion for summary judgment such as that made by the government.

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Claims

This decision is the same as the one appended to the Petition for A Writ of Certiorari filed heretofore by Petitioner, Tanker Hygrade No. 18, Inc.